IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: AR 204/2013

In the matter between:

CYPRESS ENTERTAINMENT CC First Appellant

SHAUN CRAIG RUSSOUW Second Appellant

And

INTERACTIVE TRADING 269

(PROPRIETARY) LIMITED First Respondent

TEAZERS COMEDY AND REVUE CC Second Respondent

J U D G M E N T

VAN ZŸL, J: (VAHED, J and NZIMANDE, AJ concurring)

1. This is an appeal, with leave from the Court *a quo* (Pillemer, AJ), against an order for eviction and other relief. The appeal concerns two matters. The first and what may conveniently be referred to as the main matter, was an application under case number 9919/2011

brought by the first respondent (applicant in the court below) for the eviction of the first appellant (respondent in the court below).

2. The secondary application, effectively brought in response and as an alternative in the light of the opposition raised to the main matter, was brought by the first and second respondents (as first and second applicants in the court below) against the first and second appellants (respectively as first and second respondents in the court below) for an accounting and debatement, alternatively the appointment of a liquidator to the partnership contended for by the appellants.

3. It will be convenient to refer to the parties herein as they were in the court of first instance. However, in order to avoid confusion in the light of the fact that the main application comprised only two parties, whereas the secondary application comprised four parties, the parties will be referred to as in the secondary application.

4. The main application was based upon the *rei vindicatio*, the first applicant alleging registered ownership of the property occupied by the first respondent. In support it put up a copy of the title deed to the property reflecting that ownership thereof was transferred into its name on 23 January 2008 for a purchase consideration of R3.9 million.

5. The first applicant further alleged that during or about February 2008 it and the first respondent had concluded an oral agreement of lease at a rental of R20 000-00 per month, VAT inclusive, that the first respondent failed to maintain its rental payments and that in consequence the lease was cancelled, so that the first respondent's continued occupation of the property became unlawful.

6. Neither the first applicant's ownership of the property, nor the first respondent's occupation thereof, were in dispute. The first respondent contended that it was entitled to remain in occupation of the property by virtue of an agreement of partnership concluded between the first applicant and the first respondent on or about 14 September 2009 and which continued in existence. It was further alleged that this agreement of partnership replaced a previous partnership agreement which existed between the first applicant and the second respondent. The significance of the date (14 September 2009) was that it represented the date of registration of the first respondent and that effectively the latter replaced the second respondent as partner, but otherwise the partnership remained unaffected.

7. The alleged partnership comprised the business known as "Teazer's – Durban". The first applicant's contribution thereto was to make its property available and the partnership business was thereafter conducted thereon by the second and later by the first respondent who successively controlled and managed the operation of the

business and assumed “interim liability” for all expenses incurred in improving the premises. These expenses, so it was alleged, constituted a loan to the partnership which would be repayable in the event of the dissolution thereof. The right to repayment was allegedly transferred from the second to the first respondent at the time of the substitution of the latter for the former as a partner in the business partnership. Profits, “when available” were shared between the alleged partners.

8. In the circumstances referred to above the respondents claimed a continuing right to occupation of the premises by virtue of the alleged agreement of partnership between the first applicant and the first respondent and in the alternative relied upon an alleged improvement lien in favour of the first respondent to resist eviction from the property. They denied the conclusion of any lease at any stage and disputed the ability of Mrs Demi Megan Jackson, the deponent to the founding affidavit on behalf of the first applicant, to attest to the existence thereof. This was by reason of the fact that the affairs of the first applicant had been conducted solely by her late husband Emmanuel Jackson as its sole director until the time of his death on 3 May 2010.

9. To cater for the possibility of the court sustaining the defence of partnership, the applicants then launched the secondary application on the basis that any partnership could only have been between the second applicant and either one, the other or both respondents. This

was because the second applicant was alleged to have been paying on a monthly basis costs associated with the operation of the business known as "Teazers Durban". The applicants claimed in any event to have terminated any such partnership by letter dated 12 January 2012, hence the claims for a debatement or failing that the appointment of a liquidator.

10. The court below noted of the fact that neither side to the disputes wished to resolve any of the factual conflicts by way of a referral to oral evidence. In the light thereof the court was thus constrained to deal with all the issues upon the papers before it.

11. Pillemer AJ held that the crucial question in the circumstances was whether there was a partnership between the two corporate entities, namely the first applicant (Interactive Trading) and the first respondent (Cypress Entertainment), as opposed to some other arrangement, contractual or otherwise, involving different parties.

12. In order to answer that question the court below embarked upon an extensive and detailed analysis of the evidential material before concluding that the defence of the partnership existing between the first applicant and the first respondent was fanciful and not sustainable on the papers before the court. It held that the present matter was one of those rare cases where the first respondent's version was so clearly untenable that the court was justified in

rejecting its version merely upon the papers before it. It is this conclusion which was the focus of the attack on appeal.

13. In the appeal before us counsel for the appellants submitted that the court below failed to heed the warning, to be cautious about deciding probabilities on affidavits in the face of conflicts of fact, as contained in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at paragraph 20. But the Court of Appeal extended that warning against the background of the remarks in the preceding paragraph of the same judgment.

14. There and in paragraph 19 of the judgment Shongwe JA noted that the court *a quo* had approached the matter on the basis that the facts were in dispute and that there had been no request by the appellant for the matter to be referred for evidence or to trial. The court *a quo* had then applied the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – F where it was held that the court must deal with the matter on the basis of the respondent's version, coupled with the admitted facts in applicant's papers. But the learned Judge of Appeal proceeded to approve of the remarks by Eloff AJ in *Truth Verification Testing Centre CC v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W) at 698H – J to the effect that the so-called robust common-sense approach in relation to the resolution of disputed issues on paper, whilst usually relating to situations of bald and hollow denials of factual matters, should also

apply when assessing a detailed version of events which is wholly fanciful and untenable and that a court should then be prepared to undertake an objective analysis of such disputes, when required to do so.

15. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), to which Shongwe JA referred with approval in *Buffalo Freight Systems* (supra) at page 14D, the court of appeal held in paragraph 13 that a real, genuine and bona fide dispute of fact can generally only exist where the court is satisfied that the party raising the dispute has seriously and unambiguously addressed the facts so disputed. This was because factual averments seldom stand apart from the broader matrix of circumstances which need to be borne in mind when arriving at a decision. Thus, where the answering affidavit fails to ascertain and engage adequately with the disputed facts and to reflect these fully and accurately, the court may take a robust view of the matter.

16. The Wightman decision was also referred to with approval in *Malan v City of Cape Town* 2014 (6) SA 315 (CC) in the majority judgment of Majiedt AJ at paragraph 73 where the court remarked at page 335 H that a litigant is required to engage fully and seriously with disputed allegations in an affidavit, particularly in circumstances where the relevant facts are peculiarly within the litigant's knowledge.

17. In the present appeal it is evident that the court below indeed embarked upon a detailed evaluation of the disputed partnership agreement contended for by the first respondent. But this was done against the background of the fact that the then sole director of the first applicant had died and was unable to respond with first hand knowledge to the first respondent's claims regarding the conclusion of a partnership agreement and its exposition of the alleged terms thereof.

18. In my respectful view the court a quo analysed the position thoroughly and correctly and I am unable to say that it arrived at an incorrect conclusion in all the circumstances.

19. But it seems to me that there is in any event a further answer to the first respondent's claim of a right to continued occupation of the premises dependent upon the continued existence of the alleged partnership agreement. It is common cause that the first and second applicants gave notice of the cancellation of any form of partnership which may be held to have come into existence, including *inter alia* with the first respondent, by way of the letter of 12 January 2012 which was delivered on that date to the respondents' attorneys.

20. In *Harinarain v Baijnath* 1990 (2) SA 765 (N), Booysen J held at page 766H to 767B that –

> "*As to the date of dissolution it seems to me that there is no doubt whatsoever that it was indeed on 7 June 1982 when the defendant advised the plaintiff that he had closed the banking account, had opened a new banking account, and that the partnership was dissolved. Whether he was entitled to do so at that stage is of course not a matter which can be decided upon the agreed statement of facts placed before me. Nevertheless partnership, unlike other types of contracts, is determined in circumstances such as these and the date of dissolution, as is apparent from cases such as Brighton v Clift 1970 (4) SA 247 (R) at 248H, Wiehahn and Others v Marais 1965 (1) SA 398 (T) at 401C, occurs at the date when the partner actually either repudiates or gives notice to the effect that he no longer is prepared to continue with the partnership. It is not required, as the particulars of claim in this matter seem to suppose, that there must be an acceptance of such repudiation before the partnership is in fact dissolved. It is so, though, that, if the partner has unlawfully repudiated the partnership agreement, the other party may have a claim for damages.*"

21. In *Loots v Niewenhuizen* 1997 (1) SA 361 (T) the relationship of the parties was held to be one of partnership. In terms of an oral agreement between them the respondent was to operate the appellant's shop and to provide time, labour and capital to acquire trading stock for the business and in return was entitled to half of any profits. Navsa J (as he then was) held at page 368B that –

> "*Toe die appellant die besigheid weer oorneem, is die vennootskap ontbind. Dit maak nie saak of daar behoorlik kennis deur die appellant gegee was of nie. Sien Herbst en 'n Ander v Solo Boumateriaal 1993 (1) SA 397 (T) te 399G-400C; Harinarain v Baijnath 1990 (2) SA 765 (N).*"

22. In the present matter it therefore follows that the letter of notice to the first respondent's attorneys summarily terminated, with effect from 12 February 2012, any partnership with the first applicant and upon which the first respondent could have relied. Assuming, but without deciding that the notice contained in the letter amounted to an unjustified repudiation of the alleged partnership agreement by the

first applicant, then it nevertheless still had the effect of summarily terminating the partnership agreement and that such termination occurred without the need for acceptance thereof by the first respondent.

23. In the first and second respondents' answering affidavit in the secondary application the applicants are reproached for "cherry-picking" from amongst the respondents' defences by "simply cancelling the partnership agreement" and not addressing the consequences of such cancellation. But it was held in *Espag and Another v Hattingh* 2010 (3) SA 22 (SCA) by Leach AJA (as he then was) in para 11 that the fact that partners invoked their right to cancel a partnership agreement could not amount to a breach of good faith, even if in so doing they contemplated gaining an advantage for themselves. Such cancellation did not affect the lawfulness or legitimacy of their conduct. Even if it were to be held that the first applicant was being opportunistic in cancelling any alleged partnership agreement relied upon by the first respondent, that would still not invalidate the cancellation.

24. Since, upon the first respondent's version, there was and had never been any lease of the property in terms of which its occupation could be justified, any right to continued occupation would have lapsed upon the termination of the partnership agreement upon which it relied for its continued entitlement to occupy. It follows that on this

approach and in any event no right to continued occupation had been shown by the first respondent.

25. However, insofar as it may be argued that despite such cancellation the terms of dissolution of the alleged partnership nevertheless entitled the first respondent to continued possession and occupation of the first applicant's property, there is in my judgment a further reason why such a claim is without merit.

26. The essence of the first respondent's opposition to the eviction claim is that it was a term of the alleged partnership agreement that upon dissolution thereof, its business would remain trading at and in possession of the property, pending finalisation of its liquidation. In my view and even if the court a quo were to have accepted the existence of the partnership as alleged by the first respondent, the alleged term governing dissolution of the partnership appears to be unworkable, too vague for implementation and thus unenforceable.

27. The first respondent set out the alleged nature and extent of the term in paragraph 6(h)(iv) of the answering affidavit to the main matter, as follows –

> *"(iv) In the event that the partnership were to be dissolved then, prior to such dissolution, a proper accounting and debatement would take place in which the costs of improvement would be deducted from the profits as well as any drawings made by the parties during the currency of the partnership. Thereafter a 50% division would take place. As it was anticipated that such process would take time due to the complexity thereof it was a term of the partnership agreement that until the accounting and*

> *debatement was finalised and the partnership liquidated it would continue to trade while it was viable and of financial benefit to do so."*

28. In terms of its requirements, but prior to dissolution, the accounting process would have to be satisfactorily completed. This pre-supposes consensus between the partners because no provision is made should the parties be unable to agree. Whilst all this is going on the partnership would continue to trade "while it was viable" and of financial benefit to do so. What is meant by viable and of financial benefit and to whom, were unspecified.

29. In my view the "term" for the dissolution formula as contended for by the first respondent is a transparent attempt at preserving the status quo, with the first respondent in continued and potentially indefinite possession of the "partnership business", as well as its premises, at the expense of the first respondent. It would have been unenforceable even had the court a quo held that a partnership existed between the first applicant and the first respondent.

30. There remains the issue of the alleged improvement lien and whether, all else failing, the first respondent was entitled to rely upon such a lien in order to avoid eviction. This was not persisted in during the appeal, in my view correctly so. But in the view I take regarding the outcome of the appeal I consider it preferable also to deal briefly with this issue.

31. According to the answering affidavit of the first respondent in the main matter it was contended in the penultimate paragraph that in any event it would have a right of retention over the property "*as a result of the improvements effected to it*". Details of how the alleged lien originated are to be found in the first respondent's explanation for the "new" partnership where the first respondent allegedly replaced the second respondent as the first applicant's partner.

32. The second respondent, who deposed to the first respondent's answering affidavit, explained that he had initially and as part of his contribution to the partnership business, assumed interim liability for all expenses incurred in improving the premises and that as a material term of the partnership agreement these expenses would constitute a loan to the partnership, repayable upon dissolution thereof. The effect of the new partnership was simply for the first respondent to replace the second respondent as partner and that it was specifically agreed that the new partnership would assume liability for the monies so advanced by the second respondent.

33. Thus, on the respondents' version the partnership business and not the individual partner(s) effected whatever improvements were made to the premises with funds advanced by the second respondent and later by the first respondent. It follows that no foundational facts have

been alleged which would entitle the first respondent itself to claim an improvement lien over the property.

34. In the final analysis the question upon appeal is whether we are at liberty to interfere with the conclusions of the court a quo. In this context the remarks of Brand JA in Fourie v Firstrand Bank Ltd and Another NO 2013 (1) SA 204 (SCA) at page 210 A-C are apposite –

> "*The time honoured approach by this court is, in sum, that, absent any misdirections on the part of the trial court, a court of appeal is not permitted to interfere with findings of fact (see, for example, R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705 – 706). In the event I find it unnecessary to restate the detailed reasons given by the court a quo for its factual findings ….. , which should, in my view, be endorsed by this court.*"

35. In my respectful view there is no merit in the appeal and I would dismiss the appeal, with costs.

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VAN ZYL, J

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VAHED, J

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NZIMANDE, AJ

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Date of Hearing:	**5 February 2014**
Date of Judgment:	**19 June 2015**